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Commission on the Limits of the Continental Shelf

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Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf

Legal opinion on whether it is permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission

I am writing in response to your letter of 27 May 2005. By that letter you informed me that, at its fifteenth session, held in New York from 4 to 22 April 2005, the Commission on the Limits of the Continental Shelf decided, following the report of the Chairman of the subcommission established to examine the submission of Brazil, to seek a legal opinion from the Legal Counsel of the United Nations on the following question:

> "Is it permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission?"

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In the letter you indicated that the Commission would like to receive the legal opinion before the next session of the Commission, which will be held from 29 August to 16 September 2005. You also provided me with a copy of your statement on the progress of work in the Commission at its fifteenth session (CLCS/44), paragraphs 12 to 16 of which reflect the discussions and the decision of the Commission on the matter.

I would like to inform you that in connection with the request by the Commission for a legal opinion, I received, on 15 June 2005, a note verbale from the Permanent Mission of Brazil to the United Nations, dated 13 June 2005, asking for a meeting with me for the purpose of clarifying specific aspects of the information on the Brazilian submission contained in your statement on the progress of work of the Commission at the fifteenth session.

At a subsequent meeting, held on 20 June 2005, the Acting Permanent Representative of Brazil to the United Nations handed to me a paper entitled "Clarifications to the Legal Counsel regarding the CLCS consultation contained in CLCS/44". It is my understanding that Brazil has also provided a copy of the paper to the Commission.

It is worthy of note for the purpose of the present legal opinion that the paper states in its introduction that the need to consult the Legal Counsel of the United Nations:

> "was perceived during the consideration of item 4 of the agenda of the fifteenth session of the CLCS, regarding the 'consideration of the submission by Brazil to the Commission pursuant to article 76, paragraph 8, of the 1982 United Nations Convention on the Law of the Sea'. However, the formulation of the above question by the CLCS could lead to the assumption that the referred 'additional material and information relating to the limits of its continental shelf or substantial part thereof' has no relation to the process of examination of the submission conducted by the subcommission. Such an assumption would be mistaken in the case of the Brazilian submission, given that the additional material and information submitted does not constitute a new or revised submission."

My response to the request by the Commission for a legal opinion on the question at issue is contained in a paper attached to this letter (see annex).

(*Signed*) Nicolas **Michel**
Under-Secretary-General for Legal Affairs
The Legal Counsel

Annex to the letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf

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Introduction

The question with regard to which the Commission on the Limits of the Continental Shelf (CLCS) decided to seek a legal opinion reads as follows:

> "Is it permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission?"

A description of the context within which this legal opinion was sought can be found in the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission at its fifteenth session (CLCS/44, paras. 12-16).

Part I
United Nations Convention on the Law of the Sea

(a) General observations

The United Nations Convention on the Law of the Sea is a multilateral treaty the provisions of which are therefore binding on the Commission and States parties to the Convention submitting particulars regarding the outer limit of their continental shelf along with supporting scientific and technical data to the Commission. Therefore, it is important initially to identify the provisions of the Convention which are pertinent to the question on which a legal opinion is being sought by the Commission.

(b) Pertinent provisions of the Convention

It appears that the following provisions of the Convention are relevant to the question at issue.

> *"Article 76*
>
> *"Definition of the continental shelf*
>
> "1. The continental shelf of a coastal State comprises the seabed and subsoil of the maritime areas that extend beyond its territorial sea throughout the natural prolongation of its territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
>
> "2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.
>
> ...

"7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

"8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

...

"ANNEX II. COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

"Article 1

"In accordance with the provisions of article 76, a Commission on the Limits of the Continental Shelf beyond 200 nautical miles shall be established in conformity with the following articles.

...

"Article 3

"1. The functions of the Commission shall be:

"(a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

...

"Article 4

"Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice.

"Article 5

"Unless the Commission decides otherwise, the Commission shall function by way of sub-commissions composed of seven members, appointed in a balanced manner ..."

(c) Analysis of the pertinent provisions of the Convention

It follows from the above provisions of the Convention that a coastal State, which is entitled pursuant to the provisions of article 76 of the Convention to the continental shelf extending beyond 200 nautical miles, is required to submit to the Commission for its consideration information on the limits of its continental shelf beyond 200 nautical miles. The Convention further provides that such information should include particulars of such limits accompanied by supporting scientific and technical data. Thus, under the Convention, scientific and technical data are provided by a coastal State for the purpose of supporting particulars of the limits of the continental shelf submitted by that coastal State to the Commission.

In its request for the legal opinion, the Commission enquires as to whether it is permissible, under the Convention, for a coastal State to provide to the Commission, in the course of the examination by it of the submission of that State, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were submitted to the Commission and which were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission.

It may be assumed that since additional data is presented by a coastal State in support of the particulars of the limits of the continental shelf submitted by it to the Commission, it should not contradict them. In other words, it is expected that the additional material and information should not amount to a revision of the original submission.

It appears, however, that there is nothing in the Convention that could preclude a coastal State from informing the Commission in the course of its examination of the submission of that State that further analysis of the scientific and technical data originally presented to the Commission in support of particulars of the limits of its continental shelf or substantial part thereof has brought this State to a conclusion that some of these particulars were not correct and therefore the outer limits of the continental shelf need to be adjusted.

Likewise, it appears that there is nothing in the Convention that prevents a coastal State from submitting to the Commission, in the course of the examination by the Commission of its original information, new particulars of the limits of its continental shelf or substantial part thereof if in the view of the coastal State concerned it is justified by additional scientific and technical data obtained by it.

The coastal State concerned will be expected in both cases to explain to the Commission why it believes that some of the limits of the continental shelf originally presented by it to the Commission need to be adjusted or modified and to provide the necessary scientific and technical data supporting this conclusion. It will, of course, then be for the Commission to examine, in the light of its mandate as defined by the Convention, the original submission together with the proposed new limits of part of the continental shelf of the coastal State concerned and to determine whether they meet the requirements of article 76 of the Convention. The findings of the Commission will be reflected in its recommendations on the submission.

Coastal States are expected to act in good faith and exercise caution so that the work of the Commission and the establishment of the outer limits of the continental shelf of these States are not unreasonably prolonged or delayed.

The analysis of the legislative history of the Convention indirectly supports the above conclusions. The travaux preparatoires of the Convention [Official Records of the Third United Nations Conference on the Law of the Sea, Vols. I-XVII][1] show that delegations did not discuss the modalities through which a coastal State would provide the Commission with the particulars of the limits of its continental shelf and the supporting scientific and technical data. Consequently, the fact that the Convention does not expressly permit the coastal State to submit new particulars during the course of the examination of the original submission by the Commission cannot be interpreted to imply that States cannot do so.

Part II
Rules of procedure and other documents of the Commission

(a) General observations

The Commission is a treaty body which is established by the Convention to perform functions defined in article 3, paragraph 1, of annex II to the Convention. In accordance with subparagraph 1 (a) of that article, the Commission, as noted above, is entrusted with the responsibility to consider the data and other material submitted by a coastal State concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the statement of understanding adopted by the Conference.

In addition to the explicit authority conferred upon it by the Convention, it is recognized that as a treaty body the Commission has certain implied powers that are essential for the fulfilment of its responsibilities under the Convention.

This is the case of the power to adopt rules of procedure and other relevant documents with a view to facilitating the discharge of the functions of the Commission in an orderly and effective manner. Due to the nature of the functions of the Commission, its rules of procedure and other relevant documents are not merely organizational, or internal, in nature. On the contrary, they also offer guidance to States which make a submission to the Commission. Unlike the case of the International Seabed Authority (see article 149, para. 4), the Convention does not contain any article providing the Commission with the power to adopt its own rules or procedure. The Commission, therefore, can do so only by exercising a power which is conferred upon it by necessary implication as being essential to the performance of its duties. The same applies to other relevant documents. This is consistent with the 1949 advisory opinion by the International Court of Justice on *Reparations for injuries suffered in the service of the United Nations*. The Court found in that opinion, inter alia, that "under international law, the Organization must be deemed to have those powers, which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties" (*I.C.J. Reports, 1949*, p. 182). The same considerations can be applied to the Commission with regard to powers which are essential to the performance of its duties, even though not expressly provided in the Convention.

[1] United Nations publications, Sales Nos. E.75.V.3, E.75.V.4, E.75.V.5, E.75.V.10, E.76.V.8, E.77.V.2, E.78.V.3, E.78.V.4, E.79.V.3, E.79.V.4, E.80.V.6, E.80.V.12, E.81.V.5, E.82.V.2, E.83.V.4, E.84.V.2 and E.84.V.3.

It should be underlined, however, that rules of procedure and other relevant documents adopted by the Commission should be in strict conformity with the pertinent provisions of the Convention, which is the main instrument guiding the work of the Commission. In the case of any conflict between the provisions of these documents, which are supplementary by their nature, and those of the Convention, the latter shall prevail.

In this regard, it must be recalled that the Commission has adopted two documents: the rules of procedure of the Commission (CLCS/40) and the Scientific and Technical Guidelines of the Commission (CLCS/11 and Add.1).

Although the rules of procedure and the Guidelines are two separate documents, they are interrelated. The reference to the Guidelines is contained in various articles of the rules of procedure, which, inter alia, provide that "the Commission may adopt such regulations, guidelines and annexes to the present rules as are required for the effective performance of its functions" (rule 58, para. 1).

The rules of procedure of the Commission currently have three annexes, which — as provided for by rule 58, paragraph 2 — form an integral part of the rules of procedure. Of particular relevance to the present legal opinion is annex III, entitled "Modus operandi for the consideration of a submission made to the Commission on the Limits of the Continental Shelf".

It should be observed that the States parties to the Convention acknowledged in one of their decisions the right of the Commission to adopt documents necessary for the proper discharge of its responsibilities under the Convention. In the decision regarding the date of commencement of the 10-year period for making submissions to the Commission set out in article 4 of annex II to the Convention (SPLOS/72), adopted at their Eleventh Meeting, held from 14 to 18 May 2001, the States parties noted "that it was only after the adoption by the Commission of its Scientific and Technical Guidelines on 13 May 1999 that States had before them the basic documents concerning submissions in accordance with article 76, paragraph 8, of the Convention". By that decision, the States parties thus recognized the role played by the Guidelines and highlighted the particular importance they attached to them in the context of implementation of article 76, paragraph 8, of the Convention.

(b) Pertinent provisions of the rules of procedure

It appears that the following provisions of the rules of procedure of the Commission are relevant to the question at issue.

"Rule 45

"Submission by a coastal State

"In accordance with article 4 of Annex II to the Convention:

"Where a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible, but in any case within ten years of the entry into force of the Convention for that State.

...

"*Rule 47*

"*Form and language of submission*

"1. A submission shall conform to the requirements established by the Commission.

...

"*Rule 48*

"*Recording of the submission*

"1. Each submission shall be recorded by the Secretary-General upon receipt.

...

"*Rule 50*

"*Notification of the receipt of a submission and publication of the proposed outer limits of the continental shelf related to the submission*

"The Secretary-General shall, through the appropriate channels, promptly notify the Commission and all States Members of the United Nations, including States Parties to the Convention, of the receipt of the submission, and make public the executive summary including all charts and coordinates referred to in paragraph 9.1.4 of the Guidelines and contained in that summary, upon completion of the translation of the executive summary referred to in rule 47, paragraph 3.

...

"*Annex III*

"*Modus operandi for the consideration of a submission made to the Commission on the Limits of the Continental Shelf*

"*I. Submission by a coastal State*

"*1. Format and number of copies of the submission*

"1. In accordance with paragraphs 9.1.3, 9.1.4, 9.1.5 and 9.1.6 of the Guidelines, the submission shall contain three separate parts: an executive summary, a main analytical and descriptive part (main body), and a part containing all data referred to in the analytical and descriptive part (supporting scientific and technical data).

...

"*III. Initial examination of the submission*

"*3. Format and completeness of the submission*

"The subcommission shall examine whether the format of the submission is in compliance with the requirements set out in paragraph 1, and shall ensure that all necessary information has been included in the submission. If it is deemed necessary, the subcommission may request the coastal State to correct the format and/or to provide any necessary additional information, in a timely manner.

...

"*6. Clarifications*

"1. The subcommission shall determine whether there are any matters to be clarified by the coastal State.

"2. If necessary, the Chairperson of the subcommission shall, through the Secretariat, request clarification from the representatives of the coastal State on those matters. Clarifications should be sought in the form of written questions and answers and translated by the Secretariat, if necessary, into the language in which the submission was made.

...

"*IV. Main scientific and technical examination of the submission*

"*10. Additional data, information or advice*

"1. At any stage of the examination, should the subcommission arrive at the conclusion that there is a need for additional data, information or clarifications, its Chairperson shall request the coastal State to provide such data or information or to make clarifications. Such a request, articulated in precise technical terms, shall be transmitted through the Secretariat. If necessary, the Secretariat will translate the request and questions. The data, information or clarifications requested shall be provided within a time period agreed upon between the coastal State and the subcommission."

(c) Pertinent provisions of the Guidelines

"1.2. The Commission prepared these Guidelines for the purpose of providing direction to coastal States which intend to submit data and other material concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The Guidelines aim to clarify the scope and depth of admissible scientific and technical evidence to be examined by the Commission during its consideration of each submission for the purpose of making recommendations.

...

"9.1.3. The submission will be divided in three separate parts in accordance with the Modus Operandi of the Commission (CLCS/L.3). The requested format contains an executive summary (22 copies), a main body (8 copies) and all supporting scientific and technical data (2 copies).

"9.1.4. The executive summary will contain the following information:

"(a) Charts at an appropriate scale and coordinates indicating the outer limits of the continental shelf and the relevant territorial sea baselines;

"(b) Which provisions of article 76 are invoked to support the submission;

"(c) The names of any Commission members who gave advice in the preparation of the submission; and

"(d) Any disputes as referred to in rule 44 and annex I to the Rules of Procedure of the Commission."

(d) Analysis of the relevant provisions of the rules of procedure and Guidelines

In analysing the provisions of the rules of procedure of the Commission and of the Scientific and Technical Guidelines it must be taken into account that, as noted above, these documents need to be read, understood and interpreted in the light of the Convention, the provisions of which prevail.

It follows from the rules of procedure and the Guidelines that particulars of the limits of the continental shelf and supporting scientific and technical data should be presented to the Commission by a coastal State in the form of a submission. The latter should consist of three separate parts (executive summary, main body and supporting scientific and technical data). It also follows from paragraphs 3, 6 and 10 of annex III to the rules of procedure that the subcommission established by the Commission to consider a submission may, in the course of the initial as well as at any stage of the main examination of that submission, request the coastal State concerned to provide additional data, information or clarifications regarding that submission.

As noted in the section concerning the analysis of the pertinent provisions of the Convention, it is expected that additional data, information and clarifications provided by the coastal State to the Commission in response to such requests should support, integrate and clarify the particulars of the limits of the continental shelf contained in the submission, and that they should not amount to a new or revised submission.

However, as pointed out in the same section, it is quite possible that, in preparing a response to requests for additional information, a coastal State, while reassessing the data originally submitted to the Commission, could reach the conclusion that some of the particulars of the outer limits of its continental shelf contained in its original submission to the Commission need to be adjusted. A situation may also arise in which a coastal State reaches that conclusion not in response to a request by the subcommission but on its own. This may occur, for instance, in the light of additional scientific and technical data obtained by the State concerned, or if errors or miscalculations in the submission are discovered that need to be rectified. The State concerned could then bring these to the attention of the subcommission and the Commission.

The rules of procedure and the Guidelines do not directly address these contingencies. The question, however, arises of how they should be treated in the light of the rules of procedure and the Guidelines. It may be recalled in this regard that the rules of procedure contain certain procedural requirements concerning the handling of submissions. After recording a submission (rule 48), acknowledging its receipt to the submitting coastal State (rule 49) and notifying the Commission and all States Members of the United Nations, including States parties to the Convention, of the receipt of the submission (rule 50), the Secretary-General of the United Nations is required to make public the executive summary of the submission, including all charts and coordinates indicating the outer limits of the continental shelf (paragraph 9.1.4 of the Guidelines).

In the event that a coastal State submits new particulars related to the proposed outer limits of its continental shelf, either in response to requests by the Commission for additional data and information or clarifications or on its own, an issue may arise with regard to the due publicity given to the original submission. If

the new particulars lead to a significant departure from the original limits contained in the executive summary that was given due publicity by the Secretary-General of the United Nations, it appears that the newly proposed particulars of the outer limits of the continental shelf should be given similar publicity. All States have an interest in being notified about the limits proposed in a submission. The outer limits of the continental shelf of a State also define the Area (the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction), which is, together with its resources, the common heritage of mankind (article 136 of the Convention). According to the preamble of the Convention, the exploration and exploitation of the Area and its resources "shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States". The Commission therefore should consider whether it would be advisable to address the issue of due publicity with regard to new particulars submitted to the Commission in the course of the examination of the original submission in one of its documents.

The question of whether there is a significant discrepancy between the originally submitted and the newly proposed particulars can be properly addressed only by the body with the required scientific and technical competence, namely the Commission. If the Commission concludes that such a discrepancy is significant, it may consider requesting the coastal State concerned to provide the Secretary-General of the United Nations with an addendum to its executive summary so that due publicity is given to this new information through its circulation to all States Members of the United Nations, including States parties to the Convention. The coastal State, of course, could make such a determination itself and directly provide an addendum to the Secretary-General for the purposes of due publicity. However, the Secretary-General should be guided in this regard by the Commission.

It should be observed that the analysis of State practice which has developed following the circulation of the executive summary of the first submission shows that sometimes other States find it necessary to provide comments on particular aspects of the executive summary by sending notes verbales to the Secretary-General with a request that those comments be brought to the attention of the Commission and be circulated to all States Members of the United Nations. The Commission may wish to consider whether this emerging practice should be taken into account and a time frame be established giving States an opportunity to provide comments on the addendum to the executive summary containing the new particulars of the limits of the continental shelf or substantial part thereof of the coastal State concerned.

Conclusions

Additional material and information relating to the limits of the continental shelf or substantial part thereof, provided by a coastal State to the Commission in response to its requests for additional data, information or clarification in the course of the examination by the Commission of the submission of that coastal State, is expected to support, integrate and clarify the particulars of the limits of the continental shelf contained in the submission.

However, there is nothing in the Convention that precludes a coastal State from submitting to the Commission, in the course of the examination by it of the submission of that State, revised particulars of the limits of its continental shelf if

the State concerned reaches a conclusion, while reassessing in good faith the data contained in its submission, that some of the particulars of the limits of the continental shelf in the original submission should be adjusted, or if it discovers errors or miscalculations in the submission that need to be rectified.

Likewise, the Convention does not prevent a coastal State from submitting to the Commission, in the course of the examination by it of the submission of that State, new particulars of the limits of its continental shelf, or substantial part thereof, if in the view of the coastal State concerned, acting in good faith, this is justified by additional scientific and technical data obtained by it.

Consequently, in the cases described above it is permissible for a coastal State which has made a submission to the Commission in accordance with article 76 of the Convention to provide to the Commission, in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission.

As the rules of procedure and the Guidelines do not address the contingencies described above and at the same time require that the executive summary of the submission by a coastal State be given due publicity by the Secretary-General of the United Nations, the Commission may wish to consider whether it would be advisable to address this issue in one of its documents and to provide the necessary guidance to the Secretary-General of the United Nations in this regard.

In concluding, it should be emphasized that it is ultimately up to the Commission in the light of its mandate defined by the Convention to determine, after examining and evaluating data and information provided to it by a coastal State, what particulars of the limits of the continental shelf of the coastal State concerned meet the requirements of article 76 of the Convention.